

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned April 4, 2007

**B & B ENTERPRISES OF WILSON COUNTY, LLC ET AL. v. CITY OF  
LEBANON ET AL.**

**Appeal from the Chancery Court for Wilson County  
No. 02111 Charles K. Smith, Chancellor**

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**No. M2006-02464-COA-R9-CV - Filed on April 9, 2007**

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This appeal involves a dispute arising out of the development of a subdivision in Wilson County. After the planning commission refused to approve two phases of the subdivision, both the Chancery Court for Wilson County and this court determined that the planning commission had acted arbitrarily and capriciously. Thereafter, the developers sought permission to amend their original petition for common-law writ of certiorari to add an inverse condemnation claim. The trial court permitted the developers to amend their complaint but granted the planning commission permission to pursue an interlocutory appeal. We have determined that an interlocutory appeal is necessary to prevent needless, expensive and protracted litigation. We have also determined that trial court's order allowing the amendment must be reversed because an inverse condemnation claim cannot be combined with a petition for writ of certiorari.<sup>1</sup>

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Chancery Court Reversed**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Derrick C. Smith, Nashville, Tennessee, for the appellants, City of Lebanon, City of Lebanon Planning Commission, Patsy Anderson, Ronnie Kelly, David Cook, Don Fox, Claude Wilson, Joe Holbrook, Nick Locke, Jan Mangrum, Joe Hayes, and Johnnie Peyton.

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<sup>1</sup>Pursuant to Tenn. R. App. P. 2, we suspend the application of Tenn. R. App. P. 24, 25 and 29, and find oral argument to be unnecessary pursuant to Tenn. R. App. P. 35(c). See *Hammock v. Sumner Co.*, No. 01A01-9710-CV-00600, 1997 WL 749461 (Tenn. Ct. App. Dec. 5, 1997) (No Tenn. R. App. P. 11 application filed).

## MEMORANDUM OPINION<sup>2</sup>

### I.

On February 26, 2002, the City of Lebanon Planning Commission declined to approve the final plans for Phases II and III of the Chaparral Subdivision. On April 12, 2002, Chaparral's developers, B & B Enterprises of Wilson County, LLC and Hal Bone,<sup>3</sup> filed a petition for a common-law writ of certiorari in the Chancery Court for Wilson County seeking judicial review of the planning commission's decision. The trial court granted the petition and directed the planning commission to approve the plans after determining that the commission had acted arbitrarily and capriciously. This court affirmed the trial court's decision and remanded the case for further proceedings consistent with its opinion. *B & B Enterprises of Wilson Co., LLC v. City of Lebanon*, No. M2003-00267- COA-R3-CV, 2004 WL 2916141 (Tenn. Ct. App. Dec. 16, 2004) (No Tenn. R. App. P. 11 application filed). This court's mandate issued on February 23, 2005.

On December 2, 2005, B & B Enterprises filed a motion in the trial court seeking to amend their original petition for common-law writ of certiorari. The proposed amendment contained an inverse condemnation claim seeking damages.<sup>4</sup> The trial court allowed the amendment and determined that it would relate back to the date of the original petition. However, the trial court also granted the planning commission permission to appeal pursuant to Tenn. R. App. P. 9. The planning commission filed its Tenn. R. App. P. 9 application in this court on November 16, 2006. B & B Enterprises has not filed an answer as contemplated by Tenn. R. App. P. 9(d).

### II.

Tenn. R. Civ. P. 15.01 provides that “[a] party may amend the party’s pleadings once as a matter of course at any time before a responsive pleading is served . . . otherwise a party may amend the party’s pleadings only by written consent of the adverse party or by leave of court . . . .” Leave to amend should be freely given when justice requires. Decisions regarding the amendment of a complaint lie within the sound discretion of the trial court. *Wilson v. Ricciardi*, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989). In deciding whether to grant a motion to amend, the court may consider such factors as “undue delay in filing, lack of notice to the opposing party, bad faith by the moving party,

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<sup>2</sup>Tenn. Ct. App. R. 10 provides:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

<sup>3</sup>We will refer to B & B Enterprises and Hal Bone collectively as “B & B Enterprises.”

<sup>4</sup>The amended complaint also contained a civil rights claim pursuant to 42 U.S.C. § 1983, but the plaintiffs later non-suited that claim.

repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment.” *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. App.1979). Amendment should be denied when granting the motion would be futile. *Forsythe v. Gibbs*, No. M2001-02055-COA-R3-CV at \*5, 2002 WL 1869415 (Tenn. Ct. App. Aug. 15, 2002) (No Tenn. R. App. P. 11 application filed).

A petition for common-law writ of certiorari is an appellate action in which review is generally limited to the record made before the lower tribunal or board. *421 Corp. v. Metro. Gov’t of Nashville & Davidson County*, 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000). The reviewing court is not permitted to weigh the evidence, *Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 277 (Tenn. 1980), to inquire into the intrinsic correctness of the lower tribunal’s decision, *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997), or to substitute its judgment for that of the lower tribunal or board. *421 Corp. v. Metro. Gov’t of Nashville & Davidson County*, 36 S.W.3d at 474. The reviewing court is prohibited from receiving new or additional evidence. *Weaver v. Knox County Bd. of Zoning Appeals*, 122 S.W.3d 781, 786 (Tenn. Ct. App. 2003). A claim for inverse condemnation, on the other hand, is an original action in which the trial court is expected to receive and weigh evidence.

This court has long held that an appellate cause of action (*i.e.*, a petition for common-law writ of certiorari), cannot be joined with an original cause of action (*i.e.*, a complaint for inverse condemnation). *Winkler v. Tipton County Bd. of Educ.*, 63 S.W.3d 376, 383 (Tenn. Ct. App. 2001); *Goodwin v. Metro. Bd. of Health*, 656 S.W.2d 383, 386-87 (Tenn. Ct. App. 1983) (holding that “[t]he necessity of a separation of appellate review of a matter and trial of another matter ought to be self evident . . . Like water and oil, the two will not mix.”). Where an original action for damages has been joined with a petition for writ of certiorari, the claim for damages should be dismissed at the very outset. *Byram v. City of Brentwood*, 833 S.W.2d 500, 502 (Tenn. Ct. App. 1991); *Goodwin v. Metro. Bd. of Health*, 656 S.W.2d at 387.

B & B Enterprises’s claim for damages for inverse condemnation cannot be joined with its petition for writ of certiorari. Allowing B & B Enterprises to amend its pleadings to include the inverse condemnation claim would thus be futile because the inverse condemnation claim would be subject to immediate dismissal. Accordingly, the trial court erred in granting the motion to amend.

### III.

The Tenn. R. App. P. 9 application for permission to appeal is hereby granted. The trial court’s November 6, 2006 order granting B & B Enterprises’s motion to amend is vacated and the case is remanded for the entry of an order denying the motion to amend. B & B Enterprises of Wilson County, LLC and Hal Bone are taxed with the costs for which execution may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.